(10)

No. 90-1124

In the Supreme Court of the United States

OCTOBER TERM, 1991

KEITH JACOBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

VICKI S. MARANI
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether petitioner was entrapped as a matter of law as a result of the undercover investigation that led to his prosecution for receiving child pornography.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Constitution and statutes:

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1124

KEITH JACOBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc, Pet. App. 1a-19a, is reported at 916 F.2d 467. The panel opinion of the court of appeals, Pet. App. 20a-29a, is reported at 893 F.2d 999.

JURISDICTION

The judgment of the en banc court of appeals was entered on October 15, 1990. The petition for a writ of certiorari was filed on January 14, 1991 (a Monday), and was granted on April 22, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutes are reprinted in an appendix to this brief.

STATEMENT

After a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of receiving through the mails material depicting minors engaged in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(2). He was sentenced to two years' probation and 250 hours' community service. A panel of the court of appeals reversed his conviction, but on rehearing the en banc court of appeals affirmed.

1. In May 1987 petitioner ordered a magazine depicting young boys engaging in sexual activity. The distributor of the magazine turned out to be an undercover postal inspector, and petitioner was arrested the next month, following a controlled mail delivery of the magazine. Pet. App. 2a; Tr. 214-229. That delivery was the culmination of an investigation of petitioner conducted by the United States Postal Inspection Service and the United States Customs Service in parallel undercover operations known as "Project Looking Glass" and "Operation Borderline." One of the purposes of those operations was to reduce the traffic in child pornography by identifying and prosecuting individuals on the demand side of the market —*i.e.*, the mail-order consumers of such material. Tr. 25-29, 79-87, 92-97, 145-149.

Petitioner came to the attention of the Postal Inspection Service after authorities searched a California pornographic bookstore (Electric Moon) in May 1984 and discovered petitioner's name on the store's mailing list. Pet. App. 2a; Tr. 21, 30, 71-74, 165, 172, 211, 345-346, 378. Petitioner had ordered two magazines and a brochure from the store in February 1984. Pet. App. 2a; Tr. 21, 258-260, 423-425, 460-462; GXs 5, 6. The brochure, which was entitled *The Everything Brochure*, GX 17, listed stores in

the United States and Europe that sold sexually explicit materials, including child pornography (referred to as "lolita" and "boy" material). The magazines, *Bare Boys I* and *Bare Boys II*, GXs 18A and 18B, consisted almost entirely of photographs of nude pre-teen and teenage boys in poses that focused on their genitalia. Interspersed among the photographs were written tributes to "the natural life" and family nudist camps, although the magazines contained no photographs of men, women, or girls. Pet. App. 2a; Tr. 232, 252-257. The only advertisement in the magazines was one for two other series of magazines published by the same outfit: a five-issue series entitled *Nudist Angels*, the covers of which appear in the ad and feature young girls, and a two-issue series entitled *Nudist Children*. See GX 18A.[1]

---

[1] Petitioner's characterization of *Bare Boys I* and *II* as "nudist magazines depicting boys in their teens and early twenties in outdoor settings," Pet. 5-6, is belied by the magazines themselves, most of the subjects of which are obviously younger children. Moreover, the characterization in petitioner's brief is at odds with petitioner's own trial testimony, in which he admitted that the magazines depicted very young boys. Tr. 462-463.

Petitioner's claim that the trial court itself was "doubtful," Br. 14-15, that *Bare Boys I* and *II* were anything other than mere "nudist" magazines is also misleading. When the district court referred to the magazines as "nudist magazines that talked about health and that type of thing," Tr. 236, the court had not yet seen the magazines, *ibid.* ("I, of course, have not seen the magazines."). Once the court acceded to the prosecutor's request to review the magazines, Tr. 238, the court had no trouble concluding that they were "lascivious" within the meaning of 18 U.S.C. 2256(2)(E). Tr. 252. See also Tr. 386-387 (district court's ruling rejecting petitioner's motion for a judgment of acquittal). The court therefore admitted the magazines into evidence, cautioning the jury that "this evidence is received only * * * to show what predisposition, if any, the defendant may have had towards the receipt

Based on petitioner's purchase of these publications, in late January 1985 a postal inspector sent petitioner a letter from a fictitious organization called the American Hedonist Society (AHS), as well as a membership application that included a survey on sexual attitudes. GX 7. The letter described the society as one whose members believe that "pleasure and happiness is the sole good in life" and that "we have the right to read what we desire" without restrictions set by "an outdated puritan morality." Members would supposedly be able to correspond with others of similar views and would receive a quarterly newsletter entitled "It's a Small World." Petitioner applied for membership in the society in February 1985, remitting the $4 membership fee, certifying that he would keep all information received from the society in strict confidence, and noting in response to a question on the survey that he enjoyed material on pre-teen sex. Pet. App. 2a; Tr. 165-168, 174-175, 346, 469-471.[2]

In response to petitioner's request for enrollment in AHS and his avowed interest in material on pre-teen sex, the postal inspector sent him a letter from a fictitious company, Midlands Data Research (MDR), on May 27, 1986. GX 8. The letter described MDR as a firm seeking to hear from people

---

of this type of material." J.A. 4. The jury was also informed of the parties' stipulation that, "at the time the defendant received the *Bare Boys* magazines, the receipt of visual depictions of minors engaged in sexually explicit conduct was not a violation of federal law. The parties do not agree as to whether or not the magazines * * * show minors engaged in sexually explicit conduct." Tr. 21.

[2] That question and response were the only items on the AHS survey that were admitted into evidence. Tr. 469-471, 546-547.

who "believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophite [*sic*] age." *Ibid.* The letter directed those who are "not interested in any of the sexually fulfilling situations mentioned" to "throw this letter away," and stated that those who were "interested in sharing with others of similar interests[] your experiences with the youth of your community" could write MDR. *Ibid.* Petitioner promptly replied. On May 31, 1986, petitioner wrote at the bottom of the MDR letter: "Please feel free to send me more information. I am interested in teenage sexuality. Please keep my name confidential." *Ibid.*; Pet. App. 2a; Tr. 180, 210-212, 335, 337, 345-346, 356-357, 366, 378.

The postal inspector responded to that communication from petitioner in late July 1986 by sending him a letter, DX 102, and a survey, GX 9, purportedly from the Heartland Institute for a New Tomorrow (HINT). The letter described HINT as a lobbying organization founded "to protect and promote sexual freedom and freedom of choice," and seeking "to eliminate any legal definition of 'the age of consent'" and "to repeal all statutes which regulate sexual activities, except those laws which deal with violent behavior, such as rape." DX 102. The letter indicated that HINT had commissioned MDR to send petitioner a survey and that petitioner had failed to return it.

In early August 1986, petitioner initialed and returned the HINT letter with the following message typed in capital letters at the top: "Note: I have not been asked by you before to participate in an attitude survey. I did receive a mailing from you in regards to sexual interests which I replied to. I am returning your current survey filled out. Thanks. Please let me hear from you if other surveys will be

conducted. Sincerely, Keith." *Ibid.*[3] On the survey form, petitioner noted that he had a greater than average interest in material on "pre-teen sex—homosexual" by circling the number "2" on a scale ranging from "1" for very interested to "5" for least interested. GX 9.[4] The survey form stated that it was not necessary for subjects to provide their names, but that those who did so might "be entitled to receive additional materials and/or benefits from the organization that commissioned this survey." GX 9, at 5. Petitioner wrote his name and address below that notice. *Ibid.*; Pet. App. 2a; Tr. 366-372, 376-378, 471-473.

In response to this additional confirmation of petitioner's interest in material on pre-teen sex, the postal inspector, posing as HINT's director, sent him a thank-you letter accompanied by five names and addresses of persons whom the letter described as having backgrounds and interests similar to petitioner's. DX 113. Each name was actually a pseudonym for the postal inspector. Using one of the pseudonyms, "Carl Long," the postal inspector wrote to petitioner in mid-September 1986, expressing his support for HINT and his interest in sports, hiking, and collecting erotic literature. GX 11.[5] Petitioner wrote back, expressing his support for HINT, describing his interests ("primarily" in "male-male

[3] Postal Inspector Comfort testified that he had mistakenly sent petitioner a form letter and questionnaire from HINT, instead of from MDR. Tr. 367, 371-372.

[4] That was the only item on the HINT survey that was admitted into evidence. Tr. 472-473, 546-547.

[5] Postal Inspector Comfort explained that this technique is known as "mirroring." It involves the use of communications that reflect the interests of the addressees in an attempt to obtain information. Tr. 342, 343.

items"), and stating that he "collect[s] erotica. I used to collect mostly magazines but I have purchased a VCR and now collect or rent video tapes." Petitioner asked "Carl" to keep corresponding with him. GX 12. "Carl" again wrote petitioner, GX 13, who again responded, GX 14. In his reply, petitioner described several erotic video companies "I do business with," *ibid.*, and he ended his letter with the salutation, "[h]ope to hear from you," GX 14. "Carl" wrote petitioner once more in mid-October 1986. GX 15. When petitioner did not answer that letter, the correspondence ceased. Pet. App. 2a; Tr. 340-344, 365, 373-376, 425-426.

The Customs Service, through its consultations with the Postal Inspection Service, learned of petitioner's purchase of *Bare Boys I* and *Bare Boys II* and of his declared preference for material on pre-teen sex. Customs joined in the investigation of petitioner, and in March 1987 sent him a brochure, GX 22, from a fictitious Canadian company called Produit Outaouais. The brochure, which was patterned after genuine child pornography brochures, advertised photograph sets of "[y]oung boys in sex action fun" and noted "the worldwide ban and intense enforcement on this type of material." GX 22, at 1. The brochure further advised that "what was legal and commonplace is now an 'underground' and secretive service in order to continue serving collectors," that "[t]his environment forces us to take extreme measures to protect us and to insure your delivery," and that the recipient "will receive additional lists (unless you choose not to) at a later date." *Ibid.* The brochure instructed purchasers to place their payment into an envelope within an envelope, stated that orders would be shipped by com-

mon carrier "to avoid intrusion and for your privacy," and promised free replacement of items intercepted by Customs. *Ibid.*

On March 17, 1987, petitioner ordered a photograph set entitled "Piccolo" from the Produit Outaouais brochure. Along with the order form, petitioner enclosed a check for $16.50 and the following note, GX 24C: "I received your brochure and decided to place an order. If I like your product, I will order more later. I only have a box number but UPS delivers to me as they know where I live. Thanks, Keith." Customs never delivered the Piccolo set to petitioner. Pet. App. 2a; Tr. 27-53, 71-73, 75, 85-87, 271, 427-428, 443, 450. The mailing of the Produit Outaouais brochure was the Customs Service's only undercover contact with petitioner.[6]

Also in March 1987, petitioner answered a letter from the Far Eastern Trading Company, Ltd., another front for the Postal Inspection Service's undercover operation. The Far Eastern letter, GX 1, mentioned the efforts of the Customs Service to eliminate child pornography, noting that "many of you are denied a product because of that agency." The letter stated that by routing such material through the Virgin Islands, Far Eastern—which was supposedly located in Hong Kong—would be able to send it to Americans "without prying eyes of U.S. Customs

[6] The reason for the non-delivery is not stated in the record, although it appears that the decision not to deliver the set was made after consultation among the Customs Service, the Postal Inspection Service, and the United States Attorney's Office. See Tr. 52. Petitioner objected to the prosecutor's attempt to elicit the reason for the non-delivery from a witness from Customs, and the district court sustained the objection. Tr. 52-53. The Piccolo set was not admitted into evidence. Tr. 264.

seizing your mail." *Ibid.* Finally, the letter indicated that further information could be obtained by sending in the coupon and affirmation at the bottom of the letter. *Ibid.* Petitioner typed his name and address on the coupon, affirmed that he was not an undercover law enforcement agent trying to entrap Far Eastern,[7] and mailed the letter to Far Eastern's Virgin Islands address. *Ibid.*; Pet. App. 2a-3a; GX 1A; Tr. 92-94, 98-101, 151-152, 155-157, 427, 455.

In response to petitioner's request for more information about Far Eastern, in May 1987 the postal inspector sent him a catalog, GX 2, offering child pornography in the form of videotapes and magazines. Pet. App. 2a-3a; Tr. 102-105, 157.[8] To ensure that the catalog was realistic, it was assembled from child pornography catalogs seized in other investigations. Tr. 106-108, 118, 151. On May 5, 1987, petitioner ordered a magazine entitled *Boys Who Love Boys*, GX 4, a Danish publication. GX 3. The catalog described the contents of the magazine as follows: "11 year old and 14 year old boys get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this."[9] GX 2. Petitioner enclosed a check and a note, saying that he "[w]ill order other items later. I want to be discreet in order to protect you and me. KMJ." Pet.

[7] Pornography order forms routinely require such disclaimers. The Postal Inspection Service included one in its Far Eastern letter in order to lend authenticity to the offer of additional information. Tr. 99, 454-455.

[8] Had petitioner not requested further information, he would not have been sent the catalog. Tr. 99, 157, 213.

[9] The catalog offered the magazine for $25, a price comparable to what child pornography distributors would have charged for the magazine in the United States. Tr. 116-119.

App. 2a; GX 3; Tr. 109-111, 116-119, 157, 163, 214-216, 452, 457.[10]

Boys Who Love Boys was the subject of the controlled delivery that ended in petitioner's arrest on June 16, 1987. Pet. App. 2a; GXs 4, 4A; Tr. 114-115, 218-230, 429-436. While being interviewed in his home by a postal inspector, petitioner gave the inspector *Boys Who Love Boys* and *Bare Boys I* and *II*. Pet. App. 2a; Tr. 232-233, 256-257, 435-436. Also in petitioner's home were *The Everything Brochure*, the Far Eastern catalog, and the Produit Outaouais brochure from which he had ordered the undelivered Piccolo photograph set. Petitioner admitted to the postal inspector that he had expected the Piccolo set to contain pictures of naked boys 15 years old or younger. Tr. 21, 259-264, 451-452, 464.

2. In his defense, petitioner contended that he had been entrapped as a matter of law because, in his view, there was no evidence that he was predisposed to commit the charged offense. See, *e.g.*, Tr. 385. He also argued that the length and nature of the government's investigation of him were outrageous and should bar his conviction. Tr. 383-385. The trial court rejected those arguments, Tr. 386-388, but instructed the jury on the defense of entrapment, J.A. 11-13. The jury rejected the defense and convicted petitioner.

3. On appeal, petitioner reiterated his entrapment claim, although he conceded that he had "readily responded to the Looking Glass and Borderline probes," Pet. C.A. Br. 23, and that he had not been "coerced" into ordering *Boys Who Love Boys*, Pet. C.A. Reply

[10] Had petitioner not ordered anything from the catalog, the Postal Inspection Service would have terminated its investigation of him under Project Looking Glass. Tr. 109, 216.

Br. 6. With respect to his claim of outrageous government conduct, he argued that the government may not approach a person as part of an undercover operation unless it has reason to suspect the person of illegal conduct. Pet. C.A. Reply Br. 4.

Petitioner prevailed before a divided panel of the court of appeals. The majority held that "reasonable suspicion based on articulable facts is a threshold limitation on the authority of government agents to target an individual for an undercover sting operation." Pet. App. 25a. In the majority's view, *Bare Boys I* and *II* were merely "nudist" magazines, and petitioner's 1984 purchase of them neither indicated predisposition nor supplied reasonable suspicion that petitioner had committed a crime or was likely to do so. Pet. App. 21a-23a, 25a-26a. Although the majority found that in his response to the American Hedonist Society survey, petitioner had indicated a predisposition to receive sexually explicit materials depicting children, Pet. App. 21a, it concluded that the government could not rely on that evidence to rebut petitioner's entrapment claim, because the evidence was obtained only after petitioner had been illegally targeted by the undercover investigation. Pet. App. 24a, 26a. Hence, the majority ruled that petitioner had been entrapped as a matter of law. Pet. App. 26a.

Judge Fagg dissented. Pet. App. 26a-29a. He concluded that reasonable suspicion is not a prerequisite to an undercover investigation, and that, in any event, the government had reasonable suspicion here, based on petitioner's previous purchase of child erotica and a brochure outlining the methods of purchasing child pornography. Pet. App. 26a-29a.

4. On rehearing en banc, the court of appeals adopted the views of Judge Fagg. The court observed

that "[d]ue process limitations 'come into play only when the [g]overnment activity in question violates some protected right of the defendant.'" Pet. App. 3a (quoting *Hampton* v. *United States*, 425 U.S. 484, 490 (1976) (plurality opinion)). Since, in the court's view, petitioner did not have a constitutional right to be free from investigation, the initiation of the investigation did not violate petitioner's due process rights. Pet. App. 4a.

As for petitioner's argument that the government needed reasonable suspicion before investigating him, the court joined the other courts of appeals that have refused to impose such a requirement. Pet. App. 4a-5a. The court went on to find that the government's conduct in this case was not outrageous, because the government simply mailed surveys, letters, and catalogs to petitioner, and he voluntarily responded. As the court explained, "[t]he postal inspectors did not apply extraordinary pressure on [petitioner]. The inspectors merely invited [petitioner] to purchase pornographic material through the mail." Pet. App. 5a. Petitioner could have ignored the mailings, the court said, so the supposed entreaties to him involved far less pressure than face-to-face contacts. Pet. App. 6a.

The court likewise rejected petitioner's claim that he had been entrapped as a matter of law. The court found that the jury was justified in finding predisposition and in rejecting petitioner's entrapment defense, since the government had presented "ample evidence that the postal inspectors only provided [him] with opportunities to purchase child pornography and renewed their efforts from time to time as

[petitioner] responded to their solicitations." Pet. App. 6a-7a.[11]

Two judges dissented. Chief Judge Lay stated that petitioner was not predisposed to commit the offense and therefore was entrapped as a matter of law. Pet. App. 7a-8a. Judge Heaney reiterated his views, expressed in the panel opinion, that *Bare Boys I* and *II* did not evidence predisposition; that the government's investigative conduct in this case was outrageous; and that the government should be required to have reasonable suspicion of criminal activity before commencing an undercover investigation. Pet. App. 8a-19a.[12]

---

[11] The quoted passage may be misleading, in that it suggests that the agents offered petitioner opportunities to buy child pornography throughout the 28-month period that they were in communication with him. In fact, petitioner was offered only two such opportunities, in March and May 1987, and he availed himself of both of them.

[12] Judge Heaney's dissenting opinion contains several factual errors that may have contributed to his conclusion that petitioner lacked predisposition. First, Judge Heaney stated that the American Hedonist Society's newsletter, which petitioner was told he would receive if he enrolled in AHS, "advertised sexually explicit materials for sale," and that petitioner never ordered any of those materials. Pet. App. 16a. In fact, the record does not indicate whether petitioner ever received a newsletter from AHS, much less what such a newsletter would have contained.

Second, Judge Heaney stated that the letter petitioner received from Midlands Data Research was accompanied by a questionnaire, that petitioner did not answer the questionnaire, and that his failure to do so prompted the letter from the Heartland Institute for a New Tomorrow asking him to reconsider his refusal to participate in the MDR survey. Pet. App. 16a-17a, 18a. In fact, the MDR letter was not accompanied by a questionnaire; petitioner therefore did not decline to respond to any MDR survey. Instead, he told MDR

SUMMARY OF ARGUMENT

A. Petitioner was not entrapped as a matter of law into receiving child pornography through the mail. Petitioner came to the attention of the Postal Inspection Service after his name was discovered on the mailing list of a supplier of child pornography from whom he had ordered a brochure on domestic and foreign purveyors of sexually explicit materials

---

to "feel free to send me more information" because he was "interested in teenage sexuality." When the postal inspector sent him the letter from HINT, petitioner responded with a note stating that HINT had not previously asked him to participate in a survey, but that he had received a mailing from MDR on "sexual interests which I replied to," and that he would like to receive HINT surveys in the future. Pet. App. 2a; Tr. 366-372, 376-378, 471-473.

Third, Judge Heaney stated that the government presented petitioner with "a series" of opportunities to purchase child pornography through the mails. Pet. App. 18a. As we have noted, the "series" consisted of only two such opportunities, and petitioner seized both of them.

Finally, Judge Heaney stated that the fictitious companies through which the government offered to sell petitioner child pornography had assured him "that their mailings would not run afoul of United States Customs." Pet. App. 18a. In fact, neither offer left any room for doubt about its illegality. The Produit Outaouais brochure referred to "the worldwide ban and intense enforcement on this type of material," as well as "the extreme measures [needed] to protect us and to insure your delivery." See GX 22; Tr. 271. The letter from the Far Eastern Trading Company noted the Customs Service's efforts to eliminate child pornography and stated that for that reason, mail to and from the company had to be routed through the Virgin Islands. The letter required anyone interested in learning more about Far Eastern to affirm that he was not an undercover law enforcement agent attempting to entrap the company. See GX 1; Tr. 155-156. Even petitioner concedes, Br. 23, that "[t]he letter infers [*sic*] that it is illegal for Far Eastern Trading Company to import children's pornography."

and two magazines that graphically focused on the genitalia of naked boys. Undercover agents confirmed petitioner's appetite for such material through letters and surveys they sent him under the guise of fictitious organizations. As a result of petitioner's responses to those communications, in which he declared his preference for material on pre-teen sex, the Postal Inspection Service and the Customs Service offered petitioner two opportunities to order child pornography through the mail. Although both offers made their illegal nature clear, petitioner unhesitatingly accepted them, and with each order he noted that he intended to purchase more such material in the future. In addition, when petitioner ordered *Boys Who Love Boys*, the publication for which he was prosecuted, he stated that he intended to order other items later, but wanted to be "discreet."

Petitioner concedes that the government subjected him to no coercion, Br. 31; indeed, the agents had no face-to-face contacts with him, and he could easily have thrown away any communication in which he lacked interest. Thus, the government's investigative efforts did not create a substantial risk that a non-predisposed person would accept even one of its offers of child pornography, let alone both of them. As for predisposition, petitioner's prior purchases of child pornography, his declared preference for material on pre-teen sex, his immediate acceptance of both offers, and his stated intention to place more orders in the future overwhelmingly showed that he was ready and willing to receive sexually explicit depictions of children through the mail whenever he thought the risk of detection was low.

B. Petitioner was not entrapped as the result of an alleged violation of an internal guideline directing

agents who were conducting Project Looking Glass to investigate only persons whose proclivities for ordering child pornography came to the agents' attention through two sources. First, the two-source guideline is not judicially enforceable. Second, a violation of an internal guideline does not establish entrapment, since entrapment focuses principally on the defendant's predisposition. Third, the guideline was observed in this case.

C. Nor was entrapment established as a matter of law based on any alleged failure by the government to predicate its undercover investigation on reasonable suspicion that petitioner had committed or would commit a crime. The courts of appeals have uniformly rejected a reasonable suspicion requirement, and Congress has not chosen to impose one. In any event, the agents had reasonable suspicion based on petitioner's purchase of *Bare Boys I* and *II* months before the Postal inspectors first contacted him.

ARGUMENT

PETITIONER WAS NOT ENTRAPPED AS A MATTER OF LAW AS A RESULT OF THE GOVERNMENT'S INVESTIGATION

Undisputed evidence at trial established that, almost a year before undercover agents first contacted petitioner through the mails, petitioner had placed a mail order with a pornographer for two photomagazines showing nude pre-teen and teenage boys in poses focusing on their genitalia, and for a brochure listing domestic and foreign purveyors of sexually explicit materials. Undisputed evidence also showed that the agents later offered petitioner two opportunities to place mail orders for visual depictions of minors engaging in sexually explicit conduct, and that petitioner promptly took advantage of both opportunities. Nevertheless, petitioner contends that he was entrapped as a matter of law into purchasing that material. The en banc court of appeals correctly rejected his claim.

A. The Evidence At Trial Did Not Establish The Defense Of Entrapment As A Matter Of Law

1. *The entrapment defense focuses on the question whether the government caused an otherwise law-abiding citizen to commit a crime through inducements that the average person could not resist*

Entrapment is "a relatively limited defense." *United States* v. *Russell*, 411 U.S. 423, 435 (1973). It is implicated only when "the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells* v. *United States*, 287 U.S. 435, 442 (1932).[13] The entrapment defense has two related elements: government inducement of the crime, and a lack of

[13] Accord *Sorrells*, 287 U.S. at 451 ("the controlling question [is] whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials"); *id.* at 454 (opinion of Roberts, J.) ("Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."); *Russell*, 411 U.S. at 436 ("It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play."); *Hampton* v. *United States*, 425 U.S. 484, 489 (1976) (plurality opinion); *id.* at 492 n.2 (Powell, J., concurring in the judgment).

predisposition on the part of the defendant to engage in the criminal conduct. Both elements must be satisfied to make out the defense. *Mathews* v. *United States*, 485 U.S. 58, 62-63 (1988); *Russell*, 411 U.S. at 435-436; *Sherman* v. *United States*, 356 U.S. 369, 376-378 (1958); *Sorrells*, 287 U.S. at 451.

a. Inducement is the threshold issue in the entrapment defense. The courts of appeals have uniformly held that the government has induced a person to commit an offense only if "the government's behavior was such that a law-abiding citizen's will to obey the law could have been overborne," *United States* v. *Kelly*, 748 F.2d 691, 698 (D.C. Cir. 1984)—if, in other words, government conduct created "a substantial risk that an offense would be committed by a person other than one ready to commit it," *United States* v. *Johnson*, 872 F.2d 612, 620 (5th Cir. 1989).[14] For that reason, proof of inducement is generally held to require more than proof of mere solicitation.[15] That view comports with this Court's rul-

[14] See, *e.g.*, *United States* v. *Osborne*, No. 90-5691 (4th Cir. May 28, 1991), slip op. 13; *United States* v. *Evans*, 924 F.2d 714, 717 (7th Cir. 1991); *United States* v. *Evans*, 910 F.2d 790, 801 (11th Cir. 1990), cert. granted on other grounds, 111 S. Ct. 2256 (1991) (No. 90-6105); *United States* v. *Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986).

[15] See, *e.g.*, *United States* v. *Osborne*, slip op. 14; *United States* v. *Ford*, 918 F.2d 1343, 1348 (8th Cir. 1990); *United States* v. *Johnson*, 872 F.2d at 621; *United States* v. *Marino*, 868 F.2d 549, 551-552 (3d Cir.), cert. denied, 492 U.S. 918 (1989); *United States* v. *Rodriguez*, 858 F.2d 809, 812-813 (1st Cir. 1988); *United States* v. *Ortiz*, 804 F.2d at 1165; *United States* v. *Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985), cert. denied, 474 U.S. 1064 (1986); *United States* v. *Burkley*, 591 F.2d 903, 911-912 (D.C. Cir. 1978), cert. denied, 440 U.S. 966 (1979). The Second Circuit takes the position that solicitation alone may constitute inducement, *United States* v. *Dunn*, 779 F.2d 157, 158 (1985), but that is because the Second Circuit uses a slightly different mechanism for allocating the burdens of production on the entrapment issue. See generally *Burkley*, 591 F.2d at 911-914 (explaining the Second Circuit's approach).

ings that "the defense of entrapment is not simply that the particular act was committed at the instance of government officials," *Sorrells*, 287 U.S. at 451, and that the defense is unavailable when government agents merely afford a person the opportunity or facilities to commit a crime, *id.* at 441.[16]

[16] See also *Mathews*, 485 U.S. at 66; *Russell*, 411 U.S. at 435; *Sherman*, 356 U.S. at 372; *id.* at 382 (Frankfurter, J., concurring in the result); *Osborn* v. *United States*, 385 U.S. 323, 331-332 (1966); *Lopez* v. *United States*, 373 U.S. 427, 436 (1963). See 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 5.2(f)(4) (1986).

Even in its earliest consideration of the entrapment defense, this Court rejected the notion that government-initiated contacts, solicitations, and offers of opportunities to commit crimes constitute improper inducement. In *Grimm* v. *United States*, 156 U.S. 604 (1895), a government official solicited information about obscene material through the mails; the defendant was prosecuted when he responded to this solicitation. The Court rejected the defendant's challenge to the prosecution—even though the illegal material was "deposited in the mails at the instance of the government"—because "[i]t does not appear that it was the purpose of the post-office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business." 156 U.S. at 609, 610. See *id.* at 609-610. In *Casey* v. *United States*, 276 U.S. 413 (1928), the defendant provided morphine at the request of a government informant. The Court suggested that no entrapment defense would be available, since the defendant "was in no way induced to commit the crime beyond the simple request [of the informant] to which he seems to have acceded without hesitation and as a matter of course." *Id.* at 419. The government's initiation of the transaction, the Court added, was no different in sub-

Nor does the government's use of artifice, stratagem, pretense, or deceit establish inducement. Such devices are "frequently essential to the enforcement of the law," *Sorrells*, 287 U.S. at 441, especially in undercover investigations of contraband offenses and "consensual" or so-called "victimless" crimes.[17] Inducement is established only by a showing of at least " 'persuasion or mild coercion' and 'pleas based on need, sympathy, or friendship,' " *United States* v. *Nations*, 764 F.2d 1073, 1080 (5th Cir. 1985), or by "grave threats, * * * fraud * * *, or in the usual case in which entrapment is pleaded, by extraordinary promises—the sorts of promises that would blind the ordinary person to his legal duties," *United States* v. *Evans*, 924 F.2d 714, 717 (7th Cir. 1991).[18]

b. Even if the government engaged in conduct that constituted inducement, a defendant is not entrapped if his "criminal conduct was due to his own readiness and not to the persuasion of government agents," *Sherman*, 356 U.S. at 376-377, *i.e.*, when

---

stance from an agent's "ordering a drink [from] a suspect bootlegger." *Ibid.*

[17] See also *Maryland* v. *Macon*, 472 U.S. 463, 470 (1985); *Hampton* v. *United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring in the judgment); *Russell*, 411 U.S. at 432, 434-435; *Lewis* v. *United States*, 385 U.S. 206, 208-210 & n.16 (1966); *Lopez*, 373 U.S. at 434; *id.* at 465 (Brennan, J., dissenting); *Sherman*, 356 U.S. at 372.

[18] See also, *e.g.*, *United States* v. *Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986); *United States* v. *McLernon*, 746 F.2d 1098, 1113-1114 (6th Cir. 1984); *United States* v. *Andrews*, 765 F.2d at 1499; *United States* v. *Burkley*, 591 F.2d 903, 913 (D.C. Cir. 1978), cert. denied, 440 U.S. 966 (1979); *United States* v. *DeVore*, 423 F.2d 1069, 1071 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971); *Kadis* v. *United States*, 373 F.2d 370, 374 (1st Cir. 1967).

the defendant was predisposed to engage in the criminal activity. *Hampton* v. *United States*, 425 U.S. 484, 488-489 (1976) (plurality opinion) (the defense may not "be based upon governmental misconduct in a case * * * where the predisposition of the defendant to commit the crime was established"); *id.* at 492 n.2 (Powell, J., concurring in the judgment); *Russell*, 411 U.S. at 436; *Sorrells*, 287 U.S. at 448. Because a person who "needed no persuasion" to commit a crime, *Masciale* v. *United States*, 356 U.S. 386, 388 n.3 (1958), is fully culpable, predisposition is "the principal element in the defense of entrapment," *Mathews*, 485 U.S. at 63; *Russell*, 411 U.S. at 433.

The issue of predisposition focuses on whether the defendant was an "unwary innocent" who was induced to commit a crime he would not otherwise have committed, or an "unwary criminal" who simply took advantage of the opportunity to commit a crime that he was predisposed to commit if given the chance. *Sherman*, 356 U.S. at 372. The inquiry is related to the inducement question, since a defendant may suggest the absence of predisposition "by demonstrating that he had not favorably received the government plan, and the government had to 'push it' on him, * * * or that several attempts at setting up an illicit deal had failed and on at least one occasion he had directly refused to participate." *United States* v. *Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985), cert. denied, 474 U.S. 1064 (1986). But predisposition does not turn on the nature of the government's conduct; rather, it turns on whether the defendant was ready and willing to commit the crime. See 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 5.2(b) (1986); 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 13.09 (3d ed.

1977 & Supp. 1990) (a defendant is predisposed if he is "ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded"). Thus, a defendant can be predisposed even if he did not specifically contemplate breaking the law before coming into contact with an undercover law enforcement officer and even if he had never previously committed a similar crime. See, *e.g.*, *United States* v. *Osborne*, No. 90-5691 (4th Cir. May 28, 1991), slip op. 11; *United States* v. *Williams*, 705 F.2d 603, 618 (2d Cir.), cert. denied, 464 U.S. 1007 (1983); *United States* v. *Jannotti*, 673 F.2d 578, 603-604 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982). At the same time, the surest indication of predisposition is a defendant's unhesitating acceptance of the government's offer to commit a crime—or, as Judge Learned Hand described it, the defendant's "willingness to [commit the offense], as evinced by ready complaisance," *United States* v. *Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (quoting *United States* v. *Becker*, 62 F.2d 1007, 1008 (2d Cir. 1933)). In such a case, the defendant's conduct makes clear that he was "of a frame of mind such that once his attention [was] called to the criminal opportunity, his decision to commit the crime [was] the product of his own preference and not the product of government persuasion." *Williams*, 705 F.2d at 618; *Osborne*, slip op. 12.

2. The entrapment defense is generally left to the jury and may be decided by the court as a matter of law only when any reasonable jury would find that the defendant was entrapped

When the issue of entrapment is fairly raised by the evidence at trial, it is to be decided by the jury, not the court, unless the evidence establishes entrapment as a matter of law. *Mathews*, 485 U.S. at 63; *Sherman*, 356 U.S. at 377. Entrapment is established as a matter of law "only when the lack of predisposition is apparent from the uncontradicted evidence." *United States* v. *Thoma*, 726 F.2d 1191, 1197 (7th Cir.), cert. denied, 467 U.S. 1228 (1984). See *Sherman*, 356 U.S. at 373 (ruling that the defendant was entrapped as a matter of law by relying solely on the testimony of government's witnesses). The entrapment issue is generally for the jury not only because it is the body to make credibility judgments, but also because, as Judge Friendly once wrote, "the ensuing question of whether the Government has gone so far in causing the criminal conduct as to take the case outside the definition of the crime and to render punishment an act of injustice, is also highly suitable for determination by a jury, representing 'the voice of the country.'" *United States* v. *Riley*, 363 F.2d 955, 958 (2d Cir. 1966).

The only case in which this Court has found entrapment as a matter of law is *Sherman* v. *United States*, *supra*. That case involved substantial face-to-face contacts and a reluctant defendant who plainly lacked the predisposition to commit the crime of which he was convicted. In *Sherman*, the defendant, a recovering drug addict undergoing treatment for his addiction, was lured back into taking drugs by a government informant who repeatedly importuned to defendant face-to-face for drugs, purportedly to allay the agonies of the informant's own withdrawal. 356 U.S. at 371, 373. The Court found it "patently clear" that the defendant had been induced into selling narcotics by the informant, *id.* at 373, who had "play[ed] on the weaknesses of an innocent party and beguile[d] him into committing

crimes he otherwise would not have attempted," *id.* at 376, simply in order to alleviate the informant's "presumed suffering," *id.* at 371.

By contrast, the Court has declined to find entrapment as a matter of law, in spite of active government involvement in the offense, as long as the defendant was predisposed to commit the crime. In *Russell*, an undercover narcotics agent furnished the defendant with an ingredient essential to the manufacture of methamphetamine. The defendant was then prosecuted for the unlawful manufacture and sale of the drug. The defendant conceded that he had been predisposed to commit the charged offenses, but nevertheless maintained that he was entrapped as a matter of law based solely on the type and degree of government conduct, regardless of his predisposition. The Court rejected that claim, noting that "the principal element" in the entrapment defense is "the defendant's predisposition." 411 U.S. at 433. The Court held that the "[r]espondent's concession * * * that the jury finding as to predisposition was supported by the evidence is, therefore, fatal to his claim of entrapment." *Id.* at 436.

In *Hampton* the Court again made it clear that a finding of predisposition defeats the entrapment defense, despite extensive government involvement in the crime. There, a government informant furnished the defendant with drugs, which the defendant then resold to another government agent. In spite of the government's pervasive involvement in the crime, the Court held that because the defendant was predisposed to distribute drugs, he was not entrapped. 425 U.S. at 488-490 (plurality opinion); *id.* at 492 n.2 (Powell, J., concurring in the judgment).

3. The evidence in this case does not show that overbearing government inducement caused an innocent person to break the law

Applying these principles to this case, it is clear that petitioner was not entrapped as a matter of law. The evidence at trial showed that petitioner was ready and willing to contribute to "the poisonous 'kiddie porn' market," *New York* v. *Ferber*, 458 U.S. 747, 775 (1982) (O'Connor, J., concurring), by ordering such material when the opportunity presented itself. The undercover operation merely exposed petitioner's predisposition to engage in such conduct and gave him opportunities to do so. The facts of this case do not remotely resemble those of *Sherman*, and are not even as favorable for the defense as were the facts in *Russell* and *Hampton*. Accordingly, the district court could not have entered a judgment of acquittal on the basis of entrapment without impermissibly intruding on the jury's fact-finding prerogative.

a. Petitioner concedes that he was neither "coerced" nor "force[d]" into committing the crime. Br. 31; see also Pet. C.A. Reply Br. 6. He maintains instead that through "overpersistent solicitation," Br. 23, the Postal agents "trick[ed]" him, Br. 31, into believing that he could legally receive child pornography through the mail. That claim is refuted by the record.

The evidence shows that the agents offered petitioner only two opportunities to purchase child pornography through the mail. Both offers were accompanied by unambiguous warnings about the illegality of the offered material, yet petitioner acted without hesitation in taking advantage of both.

First, petitioner ordered the Piccolo photograph set, which a brochure described as showing "[y]oung

boys in sex action fun." The brochure warned of "the worldwide ban and intense enforcement on this type of material." In addition, it noted that "what was legal and commonplace is now an 'underground' and secretive service," it mentioned the need for "extreme measures" to protect the company and the purchaser, and it set forth special procedures for ordering and delivering the materials. GX 22.

Second, two months later petitioner ordered *Boys Who Love Boys*, which a catalog, GX 2, described as a magazine depicting "11 year old and 14 year old boys get[ting] it on in every way possible," including "[o]ral, anal sex and heavy masturbation." See GX 4. Petitioner purchased that magazine even though the letter from the "distributor," the Far Eastern Trading Company, explicitly advised that the Customs Service was working to eliminate child pornography, that the ordered material would have to be routed through the Virgin Islands to ensure its delivery, and that before the material could be sent to petitioner he would have to affirm that he was not an undercover agent trying to entrap the company. GX 1. Those facts conclusively rebut petitioner's claim that the government "trick[ed]" him into ordering child pornography by making it appear that he could do so legally through the mail. Br. 31.

Nothing about the agents' contacts with petitioner gave rise to the type of inducement that an ordinary person would not feel free to reject. The agents' early contacts with petitioner, which included no offers of child pornography, consisted entirely of letters and surveys that did nothing more than give petitioner opportunities to provide information about his interests, to correspond with apparently like-minded people, and to obtain further information about Far Eastern, which identified itself as a company that dealt in child pornography. Those contacts did not even remotely constitute the type of conduct that would provoke an otherwise law-abiding citizen to break the law.

It makes no difference in this case that the pre-offer contacts with petitioner occurred over a 21-month period, January 1985 to October 1986. Throughout that period petitioner not only responded to the contacts but sought to continue them.[19] What is more, none of the contacts were face-to-face. Petitioner was able to evaluate each communication in the comfort and privacy of his own home, without any pressure whatever to respond, much less to respond immediately. Petitioner could have rid himself of any of the undercover communications at any time he chose, with no more effort than a trip to the trash can.[20]

---

[19] See *United States* v. *Musslyn*, 865 F.2d 945, 947 (8th Cir. 1989) (upholding five-year American Hedonist Society/Operation Borderline investigation against claim of outrageous government conduct where defendant acted "in concert" with government during that time); *United States* v. *Goodwin*, 854 F.2d 33, 36-37 (4th Cir. 1988) (upholding three-year Project Looking Glass investigation against claim of outrageous government conduct where the defendant kept responding to contacts).

[20] See *United States* v. *Thoma*, 726 F.2d at 1197 (defendant's sale of pornography through fictitious undercover organization was not product of government inducement where organization's mailings to him were "spread out over a period of time and, unlike personal contact, could easily be ignored by one not interested in [them]"); *United States* v. *Mitchell*, 915 F.2d 521, 526 (9th Cir. 1990) (defendant who had had no face-to-face contacts with agents ordered child pornography from Far Eastern catalog "willingly and without pressure"), cert. denied, 111 S. Ct. 1686 (1991); *United States* v. *Chin*, 934 F.2d 393, 397-398 (2d Cir. 1991) (rejecting claim

The two brochures that provided petitioner with opportunities to purchase child pornography likewise did not constitute an "inducement" as that term is used in the law of entrapment. The brochures contained no threats or importunings, and they were purposely designed to mimic the brochures circulated by child pornography firms, so there was nothing atypical about the undercover materials that would make it more difficult than normal for a person receiving the brochure to ignore them. In short, nothing about the government's conduct deprived petitioner of the opportunity to exercise his free will or "blind[ed] [him] to his legal duties." *Evans*, 924 F.2d at 717.

b. With respect to predisposition, the evidence overwhelmingly established that petitioner was ready and willing to receive child pornography through the mail whenever he thought the risk of detection was low. Petitioner appears to concede his appetite for such material, Br. 14, 16, 17,[21] and he demonstrated

---

that postal authorities invaded defendant's privacy by mailing him unsolicited Far Eastern catalog in effort to discover whether he was likely to violate the law).

[21] At trial, petitioner claimed that he had been "quite shocked" to see how young the boys were in *Bare Boys I* and *II*. Tr. 463. He admitted, however, that when he ordered *Boys Who Love Boys* he knew that he would receive child pornography. Tr. 452-453. Petitioner's contention, Br. 7-8, 14, that evidence of his purchase of *Bare Boys I* and *II* and of his responses to the undercover contacts should not have been admitted because they showed his "sexual preferences rather than his criminal intent," Br. 17, is utterly without merit. Petitioner's mail-order purchase of material with a graphic focus on children's genitalia and his declared interest in material on preteen sex were directly relevant to his predisposition to commit the offense of receiving visual depictions of minors engaged in sexually explicit conduct. *United States* v. *Johnson*, 855 F.2d 299, 304 n.4 (6th Cir. 1988); *United States* v. *Gantzer*, 810 F.2d 349, 352 (2d Cir. 1987).

his willingness to obtain it through the mail when, months before the government contacted him, he ordered *Bare Boys I* and *II* and *The Everything Brochure* from a California pornographer. The *Bare Boys* magazines were compilations of photographs of naked pre-teen and teenage boys displaying their genitals. Although, as petitioner notes, Br. 14, it did not violate federal law for him to receive such magazines in February 1984,[22] that fact does not deprive his mail-order purchase of those magazines of evidentiary significance on the issue of his predisposition to receive *Boys Who Love Boys*, the magazine on which his conviction was based. *United States* v. *Gantzer*, 810 F.2d 349, 352 (2d Cir. 1987) (defendant's "propensity to receive pornographic—though not necessarily legally obscene—materials through the mail is probative of his predisposition to send legally obscene photographs"); *United States* v. *Johnson*, 855 F.2d 299, 304 n.4 (6th Cir. 1988). The reason is that proof of predisposition is not limited to evidence of criminal offenses. See, *e.g.*, *Osborn*, 385 U.S. at 332 n.11; *Gantzer*, 810 F.2d at 352; *Andrews*, 765 F.2d at 1499. See also 1 W. LaFave & A. Scott, *supra*, § 5.2(d); Marcus, *Proving Entrapment Under the Predisposition Test*, 14 Am. J.

---

[22] It became illegal to receive non-obscene child pornography even for a non-commercial purpose in May 1984, the month that petitioner's name was discovered on the California pornographer's mailing list. Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204. Congress has since passed additional legislation to deal with this problem. The recent congressional efforts to combat child pornography are described in the brief filed by Representative Bliley and other Members of Congress as amici curiae.

Crim. L. 53, 84-85 (1987). Because petitioner sought an "acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." *Sorrells*, 287 U.S. at 451-452.[23]

Petitioner's responses to the letters and surveys that the undercover agents sent to him further proved his predisposition. There were eight such contacts. With respect to six of them, petitioner not only re-

[23] Amicus ACLU suggests that the government cannot rely on petitioner's purchase of *Bare Boys I* and *II* as proof of his predisposition, because "even the government concedes [that those magazines were] entitled to constitutional protection." ACLU Amicus Br. 14 n.6; *id.* at 13-15. That argument is flawed in two respects. First, it is based on a misreading of the record. The parties stipulated at trial that "at the time [petitioner] received the *Bare Boys* magazines, the receipt of visual depictions of minors engaged in sexually explicit conduct was not a violation of federal law." Tr. 21. That stipulation does not concede that the magazines were protected by the First Amendment, and in fact they were not. As the Court held in *Osborne* v. *Ohio*, 110 S. Ct. 1691 (1990), possession of child pornography may be outlawed without offending the Constitution. Second, the ACLU is incorrect in asserting that if certain conduct is protected by the First Amendment, the prosecution may not make any evidentiary use of that conduct at trial. Even if conduct is protected, so that it may not be the subject of prosecution, it may nonetheless be relevant and admissible as evidence at a trial. See *United States* v. *Abel*, 469 U.S. 45 (1984) (membership in a prison gang is a legitimate basis for impeachment of a witness even if the witness could not be convicted for belonging to such a gang). For that reason, the First Amendment does not prohibit the use of pornographic (but not unlawful) materials involving children to prove a defendant's predisposition to commit a child pornography offense.

sponded, but also requested that the contacts continue. Petitioner sought information on "teenage sexuality" from Midlands Data Research, which indicated that it was seeking to hear from those "who believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophite [*sic*] age." GX 8. He completed the two surveys sent him by the "American Hedonist Society" and the "Heartland Institute for a New Tomorrow," declaring in both his preference for material on pre-teen sex. He asked to receive future surveys from HINT, which purported to be lobbying against age-of-consent laws for sexual activities. He wrote for further information from the Far Eastern Trading Company, which claimed to have devised a method of evading Customs seizures of child pornography. He remitted a membership fee to AHS, which offered to facilitate correspondence among members. And he answered two letters from the pseudonymous "Carl Long," in which he disclosed that he collected erotic literature and videotapes.

To be sure, petitioner did not respond to two of the eight contacts. He let pass HINT's invitation to initiate correspondence with HINT members, and he did not answer "Carl Long's" third letter, which the postal inspector sent after petitioner had responded to the first two letters and had asked "Carl" to write back to him. Petitioner's failure to respond to two of the contacts, however, does not significantly detract from petitioner's pattern of affirmative responses to the undercover contacts or otherwise show his lack of predisposition to receive child pornography. Petitioner responded enthusiastically to most of the undercover contacts, especially those offering sexually explicit materials; the two contacts to which he did not respond both involved correspondence by let-

ter with others, an activity that simply may not have interested petitioner as much as obtaining sexually explicit material. See *Thoma*, 726 F.2d at 1197 (defendant's reluctance to respond to apparent opportunities to make contact with persons expressing sexual tastes similar to his "cannot be equated with reluctance at committing the prohibited mailings"). In fact, petitioner's silence on those two occasions undermines his entrapment claim in one respect by showing that the agents' overtures were in no sense coercive; that petitioner was fully capable of ignoring them when he chose; and that when he seized the only two opportunities to purchase child pornography that the agents presented to him, he did so because he was ready and willing to commit the crime, not because the agents had pressured or beguiled him into committing it.

Petitioner's decision to order the "Piccolo" photographs from a brochure describing them as "[y]oung boys in sex action fun," GX 22, at 1, confirmed his predisposition to receive child pornography through the mail. So, too, did petitioner's accompanying note stating that he would place more mail-orders in the future if he liked the "product," GX 24C, and his later admission to the postal inspector that he expected the Piccolo set to contain pictures of naked boys 15 years of age and younger, Tr. 264.

Finally, the manner in which petitioner responded to the brochure that offered the magazine *Boys Who Love Boys* demonstrates his predisposition to order child pornography through the mail when given the opportunity to do so. He evinced no reluctance to order the magazine, which he ordered almost as soon as he received the brochure. Moreover, only someone who "needed no persuasion" to commit the crime, *Masciale*, 356 U.S. at 388 n.3, would enclose a note

with his order, as petitioner did, indicating that he would purchase additional materials in the future, but in the meantime "want[ed] to be discreet to protect you and me," GX 3. That evidence of petitioner's eagerness to place additional mail orders from a brochure that described the materials as featuring a variety of sex acts involving children thoroughly undermines his present attempt to portray himself as an "unwary innocent" who was entrapped into receiving such material.

c. Courts of appeals that have considered cases similar to this one have recognized the necessity and justification for undercover child pornography investigations.[24] "[P]urchasing child pornography, by in-

[24] The courts of appeals have consistently rejected entrapment and due process challenges to undercover operations like this one. See, *e.g.*, *United States* v. *Chin*, 934 F.2d at 397-401 (three-year postal investigation with Far Eastern letter, catalog, questionnaire, and correspondence); *United States* v. *Osborne*, slip op. 6-15 (postal investigation with questionnaire); *United States* v. *Moore*, 916 F.2d 1131, 1136-1140 (6th Cir. 1990) (postal investigation with correspondence, telephone calls); *United States* v. *Mitchell*, 915 F.2d 521, 522-526 (9th Cir. 1990) (Project Looking Glass investigation with Far Eastern letter, catalog, and questionnaire), cert. denied, 111 S. Ct. 1686 (1991); *United States* v. *Duncan*, 896 F.2d 271, 275-277 (7th Cir. 1990) (Operation Borderline investigation with Produit Outaouais brochure; postal investigation with survey); *United States* v. *Musslyn*, 865 F.2d 945, 946-947 (8th Cir. 1989) (five-year Operation Borderline investigation with membership applications, correspondence, and brochure); *United States* v. *Dornhofer*, 859 F.2d 1195, 1200 (4th Cir. 1988) (Operation Looking Glass); *United States* v. *Johnson*, 855 F.2d 299, 303-305 (6th Cir. 1988) (postal investigation with extensive correspondence); *United States* v. *Goodwin*, 854 F.2d 33, 36-37 (4th Cir. 1988) (three-year Project Looking Glass investigation with correspondence, Far Eastern letter and catalog); *United States* v. *Driscoll*, 852

creasing the demand for such materials, serves to further the sexual exploitation of minors," *United States* v. *Chin*, 934 F.2d 393, 399 (2d Cir. 1991), and "[g]overnment undercover operations are severely needed to prevent and deter those who produce, sell, purchase or traffic" in such material, *Moore*, 916 F.2d at 1139.[25]

The United States is the world's most lucrative market for child pornography, and that market is tied to the sexual exploitation of children internationally. See Note, *Can We End the Shame?—Recent Multilateral Efforts to Address the World Child Pornography Market*, 23 Vanderbilt J. Transnat'l L. 435, 447-449 (1990). While "the production of pornographic materials is a low-profile, clandestine industry, the need to market * * * requires a visible apparatus of distribution." *Ferber*, 458 U.S. at 760. Thus, "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market." *Ibid.*; see also *Musslyn*, 865 F.2d at 947

F.2d 84, 85-87 (3d Cir. 1988) (Project Looking Glass investigation with Far Eastern letter and catalog); *United States* v. *Nelson*, 847 F.2d 285, 287-288 (6th Cir. 1988) (postal investigation with multiple letters and questionnaires); *United States* v. *Rubio*, 834 F.2d 442, 450-451 (5th Cir. 1988) (postal investigation with questionnaires, correspondence); *United States* v. *Esch*, 832 F.2d 531, 538-539 (10th Cir. 1987) (postal investigation with questionnaires, correspondence), cert. denied, 485 U.S. 908 (1988); *United States* v. *Thoma*, 726 F.2d at 1198-1199 (postal investigation with survey).

[25] Child pornographers "commit serious crimes which can have devastating effects upon society and, most importantly, upon children who are sexually abused." *United States* v. *Moore*, 916 F.2d at 1139. See Comment, *Behind Closed Doors—The Clandestine Problem of Child Pornography*, 21 Creighton L. Rev. 917, 917-918 & nn.1-23 (1988), regarding the harms suffered by children used in the production of child pornography.

("The nature of the production, distribution, and sale of child pornography itself justifies this type of undercover operation [American Hedonist Society and Operation Borderline] to be utilized against those who order it."); *Goodwin*, 854 F.2d at 37 (same, Project Looking Glass).

Because "the transmission of child pornography through the mails occurs within a shroud of secrecy," *Johnson*, 855 F.2d at 305, undercover operations are necessary "if our society is ever to be free of child pornography and the heinous crime of child sexual abuse," *Moore*, 916 F.2d at 1139-1140. See also *Duncan*, 896 F.2d at 276 ("effective enforcement of laws involving the 'consensual' crime of receiving child pornography shipped in foreign or interstate commerce will generally require, as a practical necessity, the controlled delivery of items of contraband to individuals * * * who are predisposed to commit this crime"); *Chin*, 934 F.2d at 400 n.6. The investigative methods employed in this case therefore cannot fairly be characterized as pointless efforts to target an individual whose prosecution will do nothing to promote the interests underlying the federal child pornography laws.

B. Petitioner Was Not Entrapped As A Matter Of Law On The Ground That The Government Violated Internal Guidelines Regulating The Conduct Of Undercover Investigations

Petitioner maintains that he was entrapped as a matter of law on the ground that the Postal Inspection Service violated the internal guidelines of its nationwide undercover operation, Project Looking Glass, when it offered petitioner the opportunity to purchase child pornography through the Far Eastern catalog. Petitioner contends that under the guide-

lines, Project Looking Glass would contact only individuals whose interest in child pornography had come to the attention of postal inspectors from two different sources; that the rule was violated in his case; and that petitioner was therefore entrapped as a matter of law. Br. 22-23. That claim lacks merit, for several reasons.

First, an agency's standards concerning the exercise of its investigative and prosecutorial duties are not judicially enforceable unless compliance with those standards is required by a statute or the Constitution. *United States* v. *Caceres*, 440 U.S. 741, 749-755 (1979); *United States* v. *Bagnell*, 679 F.2d 826, 832 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983). Petitioner does not suggest that the two-source guideline was statutorily mandated, or that its observance was required as a matter of due process. There would be no basis for such a claim in any event, because it was plainly not the case that the internal guideline was "promulgated for [petitioner's] guidance or benefit * * * [or] that he relied on [it], or that its breach had any effect on his conduct." *Caceres*, 440 U.S. at 752-753.

Second, an agency's violation of one of its own purely discretionary guidelines cannot establish entrapment as a matter of law, because compliance or noncompliance with a guideline is irrelevant to the issue of predisposition. Cf. *Thoma*, 726 F.2d at 1199 n.3. Petitioner's argument rests on the premise that the postal agents' conduct itself can establish entrapment as a matter of law, regardless of his predisposition. As we have noted, the Court rejected similar claims in *Russell* and *Hampton*, where it held that a jury's finding or the defendant's concession of his predisposition forecloses the argument that the defendant has been entrapped as a matter of law, even if the government is substantially involved in the corpus delicti of the charged offense. See 411 U.S. at 436; 425 U.S. at 487 n.3, 490 (plurality opinion).

Finally, the Postal Inspection Service did not violate the two-source guideline in this case. The postal inspectors investigating petitioner did not refer his name to Project Looking Glass until February 1987. Tr. 93-94, 145, 210, 212. Before then, petitioner had been investigated by one of the Postal Inspection Service's regional offices. Petitioner had come to the attention of the regional office in January 1985 when his name was discovered on the mailing list of the California pornography outfit from which he had ordered *Bare Boys I* and *II*. Based on that discovery, the regional office sent petitioner letters and surveys in an effort to confirm what his prior purchase had suggested, *i.e.*, that he was using the mails to obtain child pornography. See Tr. 165-172, 333-343, 366-372, 376-378. Only after petitioner gave affirmative responses to the letters and surveys did the postal inspectors refer his name to Project Looking Glass for contact by the Far Eastern Trading Company. That internal referral thus complied with the Project's two-source guideline. See Tr. 211-212, 345-346, 378.

C. The Government Is Not Required To Have A Reasonable Basis To Believe A Person Is Engaged In Criminal Activity Before It May Approach That Person As Part Of An Undercover Investigation

Petitioner and amici claim that petitioner's conviction must be reversed because, before the postal inspectors began corresponding with petitioner, they lacked reasonable suspicion to believe that he would violate the law. Br. 26-27, 31-32; ACLU Amicus Br.

5-12, 16-19. That question, however, is not properly before this Court. The first question presented in petitioner's certiorari petition was whether the government must have reasonable suspicion with regard to a particular person before it may approach him as part of an undercover investigation, and the Court did not grant certiorari on that question. Nevertheless, we will address that argument briefly in the event that the Court considers it pertinent to the proper resolution of the issue on which the Court granted review.

1. The threshold flaw in petitioner's argument is the same as the one discussed in Point B: it ignores the defendant's predisposition to commit the crime. Petitioner and amici argue in effect that even a person who is eager to break the law at every turn is nevertheless entitled to go free if the government lacked reasonable suspicion that he was so inclined when it first approached him. That argument is inconsistent with the firmly settled principle that a defendant cannot establish entrapment if the evidence demonstrates his predisposition.

2. The argument made by petitioner and amici also has been advanced as a substantive due process claim, but the Due Process Clause does not impose on government investigations the reasonable suspicion requirement that petitioner and amici seek. Due process "come[s] into play only when the Government activity in question violates some protected right of the *defendant*." *Hampton*, 425 U.S. at 490 (plurality opinion); *United States* v. *Payner*, 447 U.S. 727, 737 n.9 (1980). Yet, as the court of appeals observed, a person "has no constitutional right to be free of investigation." Pet. App. 4a. Thus, when "the conduct of the investigation itself does not offend due

process, the mere fact that the investigation may have been commenced without probable cause does not bar the conviction of those who rise to its bait." *United States* v. *Driscoll*, 852 F.2d 84, 87 (3d Cir. 1988).[26]

For these reasons, the courts of appeals have consistently rejected the notion that the Due Process Clause or the Fourth Amendment bars suspicionless police undercover investigations.[27] Those decisions are consistent with this Court's recognition that the entrapment defense is not based in the Constitution, *Russell*, 411 U.S. at 433, but derives from the perceived intent of Congress not to punish "otherwise innocent" persons who have committed crimes at the government's instigation, *Sorrells*, 287 U.S. at 448. Because Congress is free to make this affirmative defense available on whatever conditions it deems appropriate, or even to eliminate the defense altogether,

---

[26] Nor does the Fourth Amendment impose a reasonable suspicion requirement on this practice. The Fourth Amendment does not restrict police activity that does not constitute a "search" or a "seizure." An undercover agent's offer to sell pornographic materials is in no sense either a "search" or a "seizure."

[27] See *United States* v. *Osborne*, No. 90-5691 (4th Cir. May 28, 1991), slip op. 6-8; *United States* v. *Chin*, 934 F.2d 393 (2d Cir. 1991); *United States* v. *Luttrell*, 923 F.2d 764 (9th Cir. 1991) (en banc); *United States* v. *Miller*, 891 F.2d 1265, 1269 (7th Cir. 1989); *United States* v. *Driscoll*, 852 F.2d 84, 86-87 (3d Cir. 1988); *United States* v. *Jenrette*, 744 F.2d 817, 824 & n.13 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099 (1985); *United States* v. *Gamble*, 737 F.2d 853, 860 (10th Cir. 1984); *United States* v. *Thoma*, 726 F.2d 1191, 1198-1199 (7th Cir.), cert. denied, 467 U.S. 1228 (1984); *United States* v. *Jannotti*, 673 F.2d 578, 608-609 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States* v. *Myers*, 635 F.2d 932, 941 (2d Cir.), cert. denied, 449 U.S. 956 (1980).

Russell, 411 U.S. at 433, the fact that Congress has not imposed a reasonable suspicion requirement for undercover investigations counsels against the Court's imposition of any such requirement.

As a practical matter, of course, it is generally in the interest of efficient law enforcement to conserve scarce resources by predicating undercover investigations of particular individuals on reasonable suspicion. But that will not always be the case. A reasonable suspicion requirement would severely hinder, if not altogether preclude, some commonly used undercover investigations premised on random contact with members of the general public, such as setting up a pawnshop to discover persons who fence stolen goods, and having police officers pose as buyers or sellers of drugs or other contraband, or as prostitutes. A reasonable suspicion requirement would not simply regulate such investigations; it would prevent law enforcement authorities from using these techniques at all. Prohibiting such valuable law enforcement tools is far too high a price for society to pay for protections that are neither constitutionally nor congressionally mandated. That is particularly true in light of the fact that the entrapment defense is available to any person who believes that he was an innocent, law-abiding citizen whom the government caused to break the law.

3. In any event, the agents had reasonable suspicion to conduct an undercover investigation of petitioner based on his mail-order purchase of *Bare Boys I* and *II* and *The Everything Brochure* from a California pornographer nine months before they sent him the letter and survey form from the American Hedonist Society. The *Bare Boys* magazines themselves provide more than the "minimal level of objective justification" that the reasonable suspicion standard imposes, *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989). See *Chin*, 934 F.2d at 397. Cf. *Johnson*, 855 F.2d at 304 n.4; *Gantzer*, 810 F.2d at 352. They demonstrate that the agents contacted petitioner because of his own conduct, not in a random effort to see whether a law-abiding citizen could be induced to purchase child pornography if given the opportunity to do so.

* * * * *

If this case had involved bribery or drug distribution, the arguments petitioner has made would have been given short shrift. It would trouble no one if the government initiated an undercover operation directed at a politician who expressed interest in receiving a bribe, even if he did so in a guarded or ambiguous fashion. And there would be little difficulty in dismissing the claim of a seller of controlled substances who was targeted by an undercover drug operation based on indications that he had previously been involved in distributing dangerous drugs, even if his previous involvement was in selling a drug that had not yet been placed on the federal controlled substances list. Moreover, the low-key nature of the contacts with petitioner and the clear signals in the undercover communications that the materials were unlawful would be regarded as the marks of cautious investigative work in the bribery or drug examples.

What troubled the panel in the court of appeals, we submit, is not the nature of the government's conduct, but the subject of the investigation. Both as a matter of policy and as a matter of constitutional law, there has been a vigorous debate for decades about the propriety of regulating the distribution and private possession of sexually oriented

materials. As a policy matter, however, Congress settled that debate for child pornography with the enactment of the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204, which outlaws the receipt of materials depicting children engaged in sexually explicit conduct. And as a matter of constitutional law, this Court settled the question two Terms ago by holding that it does not violate the First Amendment for the government to criminalize the private possession of child pornography. See *Osborne* v. *Ohio*, 110 S. Ct. 1691 (1990). When those concerns are set to one side, this case becomes a conventional entrapment case involving strong predisposition and fairly conservative investigative techniques. Viewed in light of this Court's decisions on the entrapment defense, the record in this case cannot fairly be read to establish that petitioner was entrapped as a matter of law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

VICKI S. MARANI
Attorney

AUGUST 1991

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Section 2252 of Title 18 provides in part:

(a) Any person who—

* * * * *

(2) knowingly receives * * * any visual depiction that has been mailed * * * or which contains materials which have been mailed * * * if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

* * * * *

shall be punished as provided in subsection (b) of this section.

(b)(1) Whoever violates paragraph * * * (2) * * * of subsection (a) shall be fined under this title or imprisoned not more than ten years, or both * * *.

2. Section 2256 of Title 18 provides in part:

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-

anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person * * *.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45004